



## ***The Committee on Energy and Commerce***

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### **Internal Memorandum**

February 15, 2012

TO: Members, Subcommittee on Oversight and Investigation

FROM: Subcommittee on Oversight and Investigations Staff

RE: Business Meeting to Authorize the Issuance of Subpoenas Ad  
Testificandum in the Solyndra Investigation to Employees of the  
Executive Office of the President

On Friday, February 17, 2012, at 9:45 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a business meeting to consider a resolution authorizing the issuance of subpoenas to five employees of the Executive Office of the President (EOP) for their testimony relating to the \$535 million loan guarantee issued to Solyndra, Inc., by the Department of Energy (DOE), at a hearing to take place on February 28, 2012.

#### **I. DISCUSSION**

##### *A. The Committee's Request to Conduct Interviews of OMB Staff*

The Committee on Energy and Commerce began investigating the Solyndra loan guarantee over one year ago.

On March 17, 2011, the Committee sent a letter to the Office of Management and Budget requesting documents and communications relating to the Solyndra loan guarantee. For four months after the Committee sent this request, OMB refused to produce its communications relating to Solyndra. On July 14, 2011, the Subcommittee on Oversight and Investigations convened a business meeting to authorize the issuance of a subpoena duces tecum to Jacob Lew, then-Director of OMB. That subpoena was served on July 15, 2011, and set a July 22, 2011, deadline for the production of documents. Attachments A and B to this Memorandum describe the Committee's negotiations with OMB relating to the March 14, 2011, document request that preceded the subpoena.

OMB did not produce the requested documents by the July 22, 2011, deadline. Instead, for two weeks following the service of the subpoena, Committee staff engaged in extensive discussions with OMB staff about OMB's compliance with the subpoena.

Although the subpoena required production of documents, OMB staff offered to make the subpoenaed documents available for *in camera* review only.

After two weeks of negotiations, OMB staff and Committee staff agreed upon a protocol for production of the subpoenaed documents. From August through October 2011, OMB engaged in a rolling production of specific documents and communications relating to the Solyndra loan guarantee that Committee staff had identified for production during a series of *in camera* reviews. These documents included certain OMB internal communications, its communications with DOE and the Department of Treasury, and some communications with White House officials.

On October 25, 2011, after reviewing the documents produced to the Committee, Committee staff requested transcribed interviews of three OMB staff who had been closely involved with the review and monitoring of the Solyndra loan guarantee and the restructuring of that loan guarantee. OMB staff responded that it was the “longstanding policy” of OMB to have OMB personnel provide briefings instead of allowing transcribed interviews of OMB personnel.

In an October 27, 2011, teleconference between OMB staff and Committee staff, OMB staff explained that it was OMB policy that only Senate-confirmed OMB staff would be provided as witnesses for hearings. Committee staff requested that OMB staff provide the Committee with a copy of this policy. When Committee staff inquired about OMB’s policy with respect to interviews of three OMB staff, OMB staff informed Committee staff that it was OMB’s policy to provide only “high level supervisors” for staff interviews, and that it had not found any cases where OMB had provided non-supervisory staff for staff interviews. OMB staff asserted that the purpose of this policy was to “protect career staff.” Committee staff pointed out to OMB staff that the Committee has routinely interviewed non-supervisory employees of Executive Branch departments and agencies.<sup>1</sup> Committee staff renewed its request that OMB make available three employees who had worked on the Solyndra loan guarantee.<sup>2</sup>

On October 29, 2011, OMB staff again refused to make available the three OMB staff for interviews. In an email to Committee staff, OMB staff stated that it was OMB’s “general practice” that congressional briefings be conducted by “high-level supervisors.” Instead, OMB staff offered to make available two supervisory staff, Sally Ericsson and Courtney Timberlake, for staff interviews.<sup>3</sup> OMB staff stated that the career staffers whom the Committee requested to interview all reported to either Ms. Ericsson or Ms. Timberlake, and that “[s]ubstantively, they were both actively involved with the restructuring of the loan and between the two of them, they can speak to all aspects of

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<sup>1</sup> Committee staff informed OMB staff that the Committee has conducted interviews of staff of numerous executive branch agencies, including the Food and Drug Administration (FDA), the Department of Health and Human Services (HHS), the National Institutes of Health (NIH), DOE, the Federal Communications Commission (FCC), and the Nuclear Regulatory Commission.

<sup>2</sup> October 27, 2011, email from Committee staff to OMB staff regarding “Follow-up.”

<sup>3</sup> October 29, 2011, email from OMB staff to Committee staff, regarding “Follow up.”

OMB's role in that transaction.”<sup>4</sup> With regard to non-supervisory OMB staff testifying at congressional hearings, OMB staff admitted that “there is no particular document describing OMB's position on witnesses at congressional hearings.”<sup>5</sup>

Based on OMB's representation that Ms. Ericsson and Ms. Timberlake could speak to “all aspects of OMB's role” in the Solyndra loan guarantee, Committee staff agreed to these staff interviews in an attempt to accommodate OMB. Ms. Ericsson's interview took place on November 8, 2011, and Ms. Timberlake's interview took place on November 3, 2011. For both interviews, Committee staff prepared a detailed list of questions about OMB's role and involvement in the Solyndra loan guarantee and its restructuring, and presented numerous documents to both witnesses. In direct contradiction of OMB's representations, Ms. Timberlake and Ms. Ericsson were unable to answer numerous questions posed by Committee staff relating to the facts and circumstances of OMB's work on the Solyndra loan guarantee. For example, Ms. Timberlake stated that she did not know the answers to numerous questions regarding the restructuring of the Solyndra loan guarantee. In particular, Ms. Timberlake was unable to answer specific questions about OMB's modeling and the assumptions used in the modeling; what specific information DOE submitted to OMB to support its position that restructuring was a workout and not a modification; and what information was conveyed to DOE, and when, regarding OMB's decision as to whether the restructuring constituted a modification or a workout. Ms. Ericsson, too, was unable to answer numerous important questions regarding her work, and the work of the employees she supervised, on the Solyndra loan guarantee. For example, she did not remember whether her staff believed the Solyndra restructuring to be a workout or a modification when DOE first briefed OMB on the restructuring, or her staff's opinion of the data and information DOE presented to OMB to support its decision to restructure the loan guarantee. In total, both Ms. Ericsson and Ms. Timberlake could not provide substantive answers to at least 20 questions posed by Committee staff.

On December 1, 2011, Chairman Upton and Subcommittee Chairman Stearns sent a letter to White House Counsel Kathryn Ruemmler, in which they raised the issue of OMB's refusal to provide OMB staff for Committee interviews. The letter did not identify the three staff members by name; Committee staff instead provided the names to the White House Counsel's office under separate cover. The letter asked for the White House Counsel's cooperation in scheduling these interviews. In a December 6, 2011, letter, Ms. Ruemmler refused to assist the Committee and recommended that the Committee discuss its requests again with OMB.

During a teleconference on December 8, 2011, Committee staff renewed the request to speak with the three OMB personnel who had worked closely on the Solyndra loan guarantee. OMB staff again refused to provide these witnesses.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

In a last-ditch effort, the Majority Members on the Subcommittee on Oversight and Investigations sent a February 9, 2012, letter to White House Counsel Ruemmler and Counsel to the Vice President Cynthia Hogan, requesting that the White House Counsel make available three OMB staff members (Kevin Carroll, Kelly Colyar, and Fouad Saad) and two White House staff members (Aditya Kumar and Heather Zichal) for interviews (Attachment E). The letter stated that if OMB did not agree to do so by February 17, the Subcommittee on Oversight and Investigations would convene a business meeting on February 17 to authorize the issuance of subpoenas for the testimony of those individuals. As of 9:00 a.m. on February 15, the Committee had not received any communications from OMB or the White House in response to the Committee's letter.

*B. The Committee's Request to Interview White House Staff*

In the February 9 letter to Counsels Ruemmler and Hogan, the Majority Members on the Committee requested that the White House provide two staff members, Aditya Kumar and Heather Zichal, for staff interviews.

The Committee requested staff interviews of Mr. Kumar and Ms. Zichal because the documents produced to the Committee to date indicate that both individuals were involved in important decisions relating to the Solyndra loan guarantee. At the time Solyndra's loan application was under review in 2009, Mr. Kumar was an assistant to then White House Chief of Staff Rahm Emanuel as a Director of Special Projects. The documents show he was communicating with DOE and OMB staff, and staff for the Vice President, about scheduling the Solyndra loan guarantee closing announcement at Solyndra's facilities that featured an appearance via satellite by Vice President Biden. Later, Mr. Kumar served as Deputy Assistant to the Vice President and Senior Advisor to the Chief of Staff at the White House. Other documents show he was informed of the decision in October 2010 and may have had some involvement in the decision to delay Solyndra's announcement of layoffs until after the midterm elections.

Ms. Zichal is the Deputy Assistant to the President for Energy and Climate Change. Documents produced to the Committee show that Ms. Zichal was informed by the Chief of Staff to DOE Secretary Chu of the decision to postpone Solyndra's layoff announcements until after the election. She was also closely involved in the discussions among the Executive Branch agencies during August 2011, as DOE was considering a second restructuring of the Solyndra loan guarantee. In addition, at least one document indicates that Zichal was involved in the discussions relating to the restructuring of the Solyndra loan guarantee in late 2010 and early 2011.

## **II. RESOLUTION**

Committee staff interviews are a crucial tool in any investigation. Documents alone cannot answer all of the relevant questions in an investigation. While the

Committee has received documents from DOE, OMB, the Department of the Treasury, and the White House, the staff interviews will assist the Committee in obtaining answers to questions that are still unresolved. With regard to Mr. Carroll, Ms. Colyar, and Mr. Saad, documents produced to the Committee show that they were closely involved with the review of the Solyndra loan guarantee. The witnesses OMB offered were unable to answer key questions about OMB's decision-making, in particular in relation to the restructuring of the Solyndra loan guarantee. Thus far, OMB has refused the Committee's requests for staff interviews. The testimony of these individuals interviews will allow the Committee to fully understand OMB's review of the information DOE provided to support its decision to restructure the guarantee, and OMB's decision that the restructuring should be categorized as a workout.

The testimony of Ms. Zichal and Mr. Kumar will allow the Committee to understand the White House's involvement in the Solyndra loan guarantee, as the few documents produced to the Committee pursuant to the November 3, 2011, subpoena do not answer many of the Committee's outstanding questions about the role of the White House in the review, approval, restructuring and subordination of the Solyndra loan guarantee.<sup>6</sup>

For these reasons, the proposed resolution will authorize Chairman Upton to issue subpoenas for the testimony of Mr. Carroll, Ms. Colyar, Mr. Kumar, Mr. Saad, and Ms. Zichal. Should OMB or the White House Counsel agree prior to February 17, 2012, to provide these individuals for staff interviews, the February 17 business meeting will be cancelled.

### **III. CONTACTS**

If you have any questions, please contact Todd Harrison or Karen Christian at (202) 225-2927.

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<sup>6</sup> See Attachment C, the February 9, 2012, letter to Counsels Ruemmler and Hogan, for a discussion of the Committee's outstanding questions relating to the Solyndra loan guarantee.